



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 013715/2022

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|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED. |

19/06/2024

Date

ML TWALA

**TOPIGS NORSVIN SA PROPRIETARY
LIMITED
APPLICANT**

And

**ESKOM HOLDINGS SOC LTD
ANDRE MARINUS de RUYTER
RESPONDENT
CALIB CASSIM
MALEGAPURU WILLIAM MAKGOBA**

**FIRST RESPONDENT
SECOND
THIRD RESPONDENT
FOURTH RESPONDENT**

BANOTHILE CHARITY MAKHUBELA	FIFTH RESPONDENT
PULANE ELSIE MOLOKWANE	SIXTH
RESPONDENT	
BUSISIWE MAVUSO	SEVENTH RESPONDENT
RODERICK de BRASSIC CROMPTON	EIGHT RESPONDENT
TSHEPO HERBERT TONG-MONGALO	NINTH RESPONDENT
MLAWULI MAYOR MAJINGOLO	TENTH RESPONDENT
DEIDRE HERBST	ELEVENTH RESPONDENT
BONGUMUSA MASHAZI	TWELFTH RESPONDENT
LESIBA KGOBE	THIRTEENTH RESPONDENT
MINSTER OF WATER AND SANITATION	FOURTEENTH RESPONDENT
DIRECTOR-GENERAL: DEPARTMENT OF	
WATER AND SANITATION	FIFTEENTH RESPONDENT
MINSTER OF FORESTRY, FISHERIES	
AND THE ENVIRONMENT	SIXTEENTH RESPONDENT
DIRECTOR-GENERAL: DEPARTMENT OF	
FORESTRY, FISHERIES AND THE	
ENVIRONMENT	SEVENTEEN RESPONDENT
MINISTER OF MINRAL RESOURCES	
AND ENERGY	EIGHTEENTH RESPONDENT
NATIONAL ERGY REGULATOR OF	
SOUTH AFRICA	NINETEENTH
RESPONDENT	
CLIVE RAYMOND LE ROUX	TWENTIETH RESPONDENT
PAUL MPHONGA MAKWANA	TWENTY- FIRST
RESPONDENT	
AUSTIN LESLIE MKHABELA	TWENTY-SECOND RESPONDENT
BUSISIWE VILAKAZI	TWENTY-THIRD RESPONDENT
LWAZI LEON GOQWANA	TWENTY-FOURTH RESPONDENT
FATHIMA BEE BEE ABDUL GANY	TWENTY-FIFTH RESPONDENT

ANYANDA PEARL ZINHLE

MAFULEKA

TWENTY-SIXTH RESPONDENT

TSKANI LOTTEN MTHOMBENI

TWENTY-SEVENTH RESPONDENT

BEKI ZACHARIA NTSHALINTSHALI

TWENTY-EIGHT RESPONDENT

NTETO NYATHI

TWENTY-NINETH RESPONDENT

TRYPHOSA RAMANO

THIRTIETH RESPONDENT

CLAUSELLE von ECK

THIRTY-FIRST RESPONDENT

JUDGMENT

TWALA J

Introduction

- [1] It is a constitutional imperative under the bill of rights in the Republic that, everyone has the right to an environment that is not harmful to their health or wellbeing and to have the environment protected for the benefit of the present and future generation. This is to be achieved through the adoption of reasonable measures and legislation that prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.
- [2] In this application, the applicant, Topigs Norsvin SA (Pty) Ltd seeks an order against the first to thirty-first respondents as prayed for in the amended notice of motion in the following terms:
- 2.1 declaring that the respondents (excluding the second, fourth, fifth and seventh respondents) are under a constitutional duty and or legal duty and or statutory duty to ensure that the water resources downstream from the Kusile Power Station are not polluted or are likely to be polluted by the construction and or

operation and or management of the Kusile Power Station and or to ensure that no substances are discharged or allowed to escape from the Kusile Power Station so as to:

- i. Pollute or likely pollute a water resource; and or
 - ii. Detrimentially affect or likely affect a water resource; and or
 - iii. Degrade or damage the environment; and or
 - iv. Cause or likely cause a threat for human health;
- 2.2 declaring that the respondents (excluding the second fourth, fifth and seventh respondents) are in breach of the duty or duties referred to in prayer 2.1 above;
- 2.3 declaring that the conduct of the respondents (excluding the second, fourth, fifth and seventh respondents), in failing to prevent and or allowing and or causing directly or indirectly and by act or omission the discharge or escape of substances from the Kusile Power Station which:
- i. Pollutes or likely to pollute a water resource; and or
 - ii. Detrimentially affects or is likely to affect a water resource; and or
 - iii. Degrade or damage the environment; and or
 - iv. Cause or likely cause a threat for human health;
- is unconstitutional and a breach of the following fundamental rights of the applicant, its directors, and its employees and or the potential water users downstream of the Kusile Power Station, namely:
- 2.3.1 the right to equality in section 9 of the Constitution of the Republic of South Africa, 1996 (hereinafter “the 1996 Constitution”);
 - 2.3.2 the right to human dignity in section 10 of the 1996 Constitution;
 - 2.3.3 the right to life in section 11 of the 1996 Constitution;
 - 2.3.4 the right to freedom and security of the person in section 12(1)(c) of the 1996 Constitution;
 - 2.3.5 the right to freedom and security of the person in section 12(2) of the 1996 Constitution;

- 2.3.6 the right to freedom of trade, occupation and profession in section 22 of the 1996 Constitution; the environmental right in section 24(a) of the Constitution;
 - 2.3.7 the environmental right in section 24(a) of the Constitution;
 - 2.3.8 the environmental right in section 24(b) of the Constitution; and or
 - 2.3.9 the right to property in section 25 of the Constitution;
- 2.4 that the first respondent (Eskom Holdings) and the third, sixth, eighth to tenth and twenty to thirty-first respondents (the current Board of Directors of Eskom Holdings) take all necessary steps within thirty (30) days of the date of this order:
- 2.4.1 to ensure that the water resources downstream from the Kusile Power Station are not polluted or are likely to be polluted by the construction and or operation and or management of the Kusile Power Station;
 - 2.4.2 to ensure that no substances are discharged or allowed to escape from the Kusile Power Station so as to:
 - i. Pollutes or likely to pollute a water resource; and or
 - ii. Detrimentally affects or is likely to affect a water resource; and or
 - iii. Degrade or damage the environment; and or
 - iv. Cause or likely cause a threat for human health;
 - 2.4.3 to ensure that the Kusile Power Station is properly constructed and or operated and or managed fully in accordance with the terms and conditions of:
 - i. the approved Environmental Management Programme (2014) for the Kusile Power Station, as approved in terms of section 24N of the National Environmental Management Act, 107 of 1998 (hereinafter ("*the NEMA*"));
 - ii. Water Use Licence with reference 04/B20F/BCFGIJ/41 as amended, granted to the first respondent in terms of the

provisions of chapter 4 of the National Water Act 36 of 1998 (hereinafter "*the NWA*");

- iii. Water Use Licence with reference O4/B20F/CGI/1836 as amended, granted to the first respondent in terms of the provisions of chapter 4 of the NWA;
- iv. Water Use Licence with reference 06/B11K/G/6921, granted to the first respondent in terms of the provisions of chapter 4 of the NWA;
- v. Water Use Licence with reference O6/B20F/CFI/8171 granted to the first respondent in terms of the provisions of chapter 4 of the NWA;
- vi. Water Use Licence with reference 06/B20F/CIBG/10792, granted to the first respondent in terms of the provisions of chapter 4 of the NWA; and
- vii. Any other legislative instrument pertaining to the environmental governance of the construction, operation and or management of the Kusile power Station;

2.4.4 to refrain from threatening and or infringing and or breaching the fundamental rights of the applicant, its directors, and its employees and or the potential water users downstream of the Kusile Power Station as contemplated in prayer 2.3 above.

2.5 that the first respondent (Eskom Holdings) and the third, sixth, eighth to tenth and twenty to thirty-first respondents (the current Board of Directors of Eskom Holdings) and the eleventh to thirteenth respondents within ten (10) days of this order each file at this Court under oath, and provide to the applicant, the action plan and programme which they will implement without delay so as to ensure that the duties and obligations referred to in payer 2.3 and 2.4 above are performed or carried out and which address the following matters:

- 2.5.1 the steps taken to ensure that the officials, staff, employees, agents, consultants or contractors of the first respondent will give effect to the duties and obligation referred to in prayer 2.3 and 2.4 above;
 - 2.5.2 what further steps will be taken in this regard;
 - 2.5.3 who will be responsible for taking each step, as well as reporting thereon; and
 - 2.5.4 when each of such further steps will be taken;
- 2.6 that the first respondent (Eskom Holdings) and the third, sixth, eighth to tenth and twenty to thirty-first respondent (the current Board of Directors of Eskom Holdings) and the eleventh respondent to the thirteenth respondent take all necessary steps to ensure compliance with the obligations emanating from the action plan and programme as contemplated in prayer 2.5 within thirty (30) days of this order;
- 2.7 that the first respondent (Eskom Holdings) and the third, sixth, eighth to tenth and twenty to thirty-first respondents (the current Board of Directors of Eskom Holdings) and the eleventh to the thirteenth respondents each file affidavits with this court, supported by technical reports compiled by or on behalf of the first respondent in respect of the environmental management of the Kusile Power Station, and provide copies to the applicant, every fifteen (15) days calculated from the expiry of the date contemplated in prayer 2.6 above, until the order is discharged by this court, setting out or specifying the steps taken to give effect to this order, when such steps were taken, what the results of those steps have been, what further steps will be taken, who will be responsible for taking such further steps, and the time-frame within which each such step will be taken;
- 2.8 that the applicant is granted leave to file further affidavits in response to any affidavit or report from the first respondent (Eskom Holdings) and the third, sixth, eighth to tenth and twenty to thirty-first respondents (the current Board of Directors of Eskom Holdings) and the eleventh to thirteenth respondents as contemplated in this order and is granted leave to approach the court for such further orders and or directives and or relief as need be,

regarding compliance with the orders contained in 2.4 to 2.7 above (including an order for contempt of court);

2.9 that the fourteenth to nineteenth respondents within ten (10) days of this order file at this court under oath, and provide to the applicant, the action plan and programme which they will implement without delay so as to ensure that the duties and obligation referred to in payer 2.4 to 2.7 above are performed or carried out and which address the following matters:

2.9.1 the steps taken to ensure that the officials, staff, employees, agents, consultants or contractors of the first respondent will give effect to the duties and obligations referred to in prayer 2.4 to 2.7 above;

2.9.2 what further steps will be taken in this regard;

2.9.3 who will be responsible for taken each step, as well as reporting thereon; and

2.9.4 when each of such steps will be taken;

2.10 that the fourteenth to nineteenth respondent take all necessary steps to ensure that compliance with the obligations emanating from the action plan and program as contemplated in prayer 2.9 above within thirty (30) days of this order;

2.11 that the fourteenth to nineteenth respondents file affidavits with this court, supported by technical reports compiled by their officials responsible for oversight over or inspection of the environmental management of Kusile Power Station, and provide copies to the applicant, every fifteen (15) days calculated from the expiry of the date contemplated in prayer 2.10 above, until the order is discharged by this court, setting out or specifying the steps taken to give effect to this order, when such steps were taken, what the results of those steps have been, what further steps will be taken, who will be responsible for taking such steps, and time-frame within which each such step will be taken;

2.12 that the applicant is granted leave to file further affidavits in response to any affidavit or report from the fourteenth to twenty-first respondents as contemplated in this order and is granted leave to approach the court for

such further orders and or directives and or relief as need be, regarding compliance with the orders contained in prayer 2.9 to 2.11 above (including an order for contempt of court;

- 2.13 that the first respondent, in terms of section 32(3)(b) of the NEMA, pay the reasonable costs incurred by the applicant in the investigation of this matter and its preparation of r these proceedings (including the reservation fees as well as the qualifying costs and expenses of the expert witness Dr James Andries Meyer);
- 2.14 that the costs of this application be paid by the respondents (excluding the second, fourth, fifth and seventh respondents) jointly and severally, the one respondent to pay the other respondents to be absolved, and on a punitive scale as between attorney and client;
- 2.15 that such further and or alternative relief be granted as the court deems fit and or appropriate and or just and equitable and or in the public interest.

The Parties

- [3] The applicant is Topigs Norsvin SA (Pty) Limited (*“the applicant”*), a private company duly incorporated in accordance with the Companies Act, 71 of 2008 (*“The Companies Act”*), having its registered office at Suite A205, Block A, De Goedehoop Close Office Park, 121 Sovereign Drive, Route 21 Corporate Park, Irene, Pretoria, Gauteng Province.
- [4] The applicant is a swine genetics producer responsible for supplying specific pathogen – free breeding material to the South African and Sothern African Development Community (SADC) pork market. The applicant provides direct employment to about 144 people and conducts its swine genetics business also on Portions 9 and 10 of the Farm Bossemanskraal 548 JR which portions are held by the applicant under and by Title Deed Numbers T23682/1995 and T89065/2008 respectively. These portions of land where the applicant conduct its business are adjacent to the Kusile Power Station (*“Kusile”*).

- [5] The first respondent is Eskom Holdings (SOC) Ltd (“*Eskom*”), a state-owned company duly incorporated in accordance with the Companies Act, read with the Eskom Conversion Act, 13 of 2001 with its registered office at the Eskom Headquarters, Megawatt Park, 2 Maxwell Drive, Sunninghill, Gauteng Province.
- [6] Eskom is a state-owned company with a mandate for the generation, transmission, and distribution of electricity in the Republic. In pursuit of its mandate, Eskom is responsible for the construction, operation and maintenance of the partially established coal fired Kusile Power Station, which is situate at R545 Kendal and Balmoral Road, Farm Haartebeesfontein, Witbank, Mpumalanga Province.
- [7] The second to the tenth and the twentieth to thirty-first respondents are cited herein in their capacities as directors of Eskom and I propose not to devote any more time and space in describing them individually and their involvement in this case.
- [8] The eleventh to thirteen respondents are employees of Eskom in managerial positions and in particular dealing with the issues of environment. I do not intend to devote any time to describe them as well as their involvement in this matter will be dealt with later in this judgment. Where necessary, I will refer to these respondents collectively as the Eskom respondents.
- [9] The fourteenth respondent is the Minister of Water and Sanitation (“*the Minister*”), a Cabinet and National Executive member in the Republic of South Africa in charge of the Department of Water and Sanitation (“*DWS*”). The Minister and the Director-General in his department are responsible for the administration, implementation, and enforcement of compliance with the provisions of the National Water Act (“*the NWA*”).
- [10] The sixteenth respondent is the Minister of Forestry, Fisheries and Environment, a Cabinet and National Executive member in the Republic of South Africa in

charge of the Department of Environment, Forestry and Fisheries (*“the DFFE”*). The Minister and the Director-General in his department are responsible for the administration, implementation, and enforcement of compliance with the provisions of the National Environmental Management Act, 107 of 1998 (*“NEMA”*).

- [11] The eighteenth respondent is the Minister of Mineral Resources and Energy, a Cabinet and Executive member in the Republic of South Africa in charge of the department of mineral resources and energy. The Minister and the Director-General in his/her department are responsible for the administration, implementation, and enforcement of compliance with the provisions of the National Energy Regulator Act, 40 of 2004 (*“NERA”*) and the Electricity Regulation Act, 4 of 2006(*“ERA”*).
- [12] The nineteenth respondent is the National Energy Regulator of South Africa (*“NERSA”*), a juristic person established in terms of section 3 of the National Energy Regulator Act with a mandate to regulate the electricity industry. I propose to refer to the fourteenth to the nineteenth respondents collectively as the State respondents. However, it is noteworthy that the eighteenth respondent did not file any opposition and is therefore not participating in this case.
- [13] The application is opposed by the respondents, and they have filed substantial answering and further affidavits in this regard. It is only the nineteenth respondent who initially did not oppose the application and filed its notice to abide the decision of this court, but later filed what it termed an explanatory affidavit. Furthermore, at the hearing of this matter, the nineteenth respondent chose not to make any submissions when afforded an opportunity to do so. Further, it should be noted that I did not devote any attention to the fifteenth and seventeenth respondents since they are part of the two departments, the DWS and the DFFE.

- [14] At the commencement of the hearing, it was agreed amongst the parties that the issues of misjoinder and non-joinder of the parties to these proceedings should not be commenced with but should be part of the main body of argument. Put differently, instead of dealing with the issues of points in limine and the determination thereof at the beginning of the hearing, these issues were argued together with the merits of the case. However, I proposed to start with these points in limine in this judgment.
- [15] For the sake of convenience in this judgment, I propose to refer to the parties as the applicant and with regard to the respondents related to Eskom, collectively as Eskom and those related to the State collectively as the State respondents save for the eighteenth respondent who is not participating in these proceedings. However, where it is necessary to refer to a particular respondent, I shall do so by referring to such respondent by its number.
- [16] The issue of the condonation application by the fourteenth to seventeenth respondents was not argued in court but left for the court to determine same from the papers. There was no opposition to the application for condonation for the late filing of the fourteenth to the seventeenth respondents' answering and supplementary answering affidavits. The fourteenth to seventeenth respondents attributed the delay in the termination of the brief to its initial lead counsel and that the supplementary answering affidavit was necessitated by the events that took place after the answering affidavit was filed and that it covers the steps that were taken in the execution of their duties and continuous drive to enforce the provisions of the NWA and the NEMA.
- [17] In *Van Wyk v Unital Hospital and Another*¹ the Constitutional Court stated the following:

¹ 2008 (2) SA 472 (CC).

“[20] This Court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.”

[18] The Constitutional Court continued and stated that:

“[22] An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable.”

[19] It is my considered view that the reasons proffered for the delay in filing the answering affidavit and the supplementary affidavit are sound and reasonable in the circumstances of this case. Further, none of the parties suffered any prejudice as a result of the delay and the applicant had an opportunity to and replied to the answering affidavit. Furthermore, this application is of utmost importance to the State respondents that finalising it without hearing the respondents’ version would amount to a miscarriage of justice.

[20] Since it is not for this court to close the door on a litigant who proffers plausible reasons for the delay in filing its papers, it would not serve the interests of justice to not grant condonation in this case. It cannot be correct to punish a litigant for changing its lead counsel and appointing another during litigation of the matter. In cases of this nature, it is necessary and in the interest of justice to allow all the issues to be ventilated by the parties. The ineluctable conclusion is therefore that the Court condone the late filing of the answering affidavit and the supplementary

affidavit. The Court further accepts the apology for the late filing of the heads of argument tendered by the fourteenth to the seventeenth respondents.

[21] The Eskom respondents say in their answering affidavit that the applicant does not have locus standi to bring these proceedings on behalf of the downstream water users. The applicant does not identify who the group of the downstream water users comprises and does not provide any mandate to act on their behalf. It is therefore denied that the applicant brought this application not only in its own interests but as well as on behalf of the group of water users using water from the water resources downstream of Kusile.

[22] The applicant contends that it brought this application primarily based on a public right and the primary intention is to claim relief in its own interest, but which will result necessarily also affecting and benefitting the rights of others – being all water users downstream from Kusile which include the farming communities and previously disadvantage communities taking their domestic water required for agricultural purposes directly from these downstream water resources. Eskom has continuously failed to notify local communities around Kusile about water pollution incidents – hence the necessity to bring this application.

[23] Section 38 of the Constitution of the Republic of South Africa, 108 of 1996 (*“The Constitution”*) provides as follows:

“Enforcement of rights

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;

- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.

[24] It is trite that the primary purpose of section 38 of the Constitution is to broaden the standing in constitutional litigation – hence it permits anyone to act in his personal interests, the interest of others or public interest to approach the court for the relief where there is an infringement of a constitutional right. Section 38 allows people acting on behalf of others who cannot act on their own to approach the courts for relief which will benefit not only themselves but in the interests of others or of the public. Section 38 should be interpreted as giving access to the courts and justice to those that are unable to access justice on their own.

[25] In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*² the Court stated the following:

“[229] There can be little doubt that section 7(4) provides for a generous and expanded approach to standing in the constitutional context. The categories of persons who are granted standing to seek relief are far broader than our common law has ever permitted. (See, for a discussion, Erasmus *Superior Court Practice* (1994) A2-17 to A2-33.) In this respect, I agree with Chaskalson P (at paras 165 - 166). This expanded approach to standing is quite appropriate for constitutional litigation. Existing common law rules of standing have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases, the plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of a public character, however, that nexus is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition, the harm alleged may often be quite diffuse or amorphous. Of course, these categories are ideal types: no bright line can be drawn between private litigation and litigation of a public or constitutional nature. Not all non-constitutional litigation is private in nature. Nor can it be said that all constitutional challenges involve litigation of a purely public character: a challenge to a particular administrative act or decision may be of a private rather than a public character. But it is clear that in litigation of a public character, different

² 1996 (1) SA 984 (CC).

considerations may be appropriate to determine who should have standing to launch litigation. In recognition of this, section 7(4) casts a wider net for standing than has traditionally been cast by the common law.”

- [26] Based on the above, it is my respectful view that the applicant has locus standi to bring this application which will not only benefit the applicant but the communities which are the users of water from the downstream water resources of Kusile. Since everyone has the right to an environment that is not harmful to their health or well-being and to have the environment protected for the benefit of the present and the future generations, I hold the view that there is no merit in Eskom’s argument, and it falls to be dismissed.
- [27] The applicant says that there is no merit in the argument by Eskom respondents that there is a misjoinder of the Eskom employees in these proceedings because they do not have any personal interest in the matter. The eleventh to the thirteenth respondents have been joined in these proceeding since they are responsible specifically for the environmental management and effective practical enforcement of compliance with the terms and conditions of the various legislative instruments issued to Eskom. It is contended further that there is nothing in the NWA and the NEMA that suggests that employees of a company are excluded from personal liability for their acts which cause negative impact on the environment or degradation thereof.
- [28] The obligation imposed on Eskom for ensuring compliance with the environmental authorisations and water use licences, so it was contended, does not only affect Eskom but also any person acting on behalf of Eskom including its employees. The rule is that any party who has a direct and substantial interest in the order that the court might grant must be joined in the proceedings. The relief sought by the applicant, so it was argued, cannot be given effect to without the eleventh to thirteenth respondents. The NEMA imposes a positive statutory duty on these respondents as it provides for every person who causes or may cause significant

pollution or degradation to the environment to minimise and rectify such pollution or degradation.

[29] Furthermore, the applicant says that there was no need to join the Environmental Monitoring Committee (“the EMC”) in these proceedings, for it is just a committee with no legal standing. It is not a legal entity and does not have the capacity to sue or be sued in law. Further, so it was argued, no relief is sought against it since it does not have any legitimate and substantial interest in the case. The relief sought against the respondents will not have any adverse effect on the EMC, so it was contended.

[30] Eskom says that the applicant has unnecessarily joined the eleventh to the thirteenth respondents since they are just employees of Eskom and do not have any substantial and legitimate interest in this case. The applicant’s argument that there is nothing in the NWA and or the NEMA which suggests that employees cannot also be held personally liable has no merit. A party can be joined in the proceedings, so it was contended, if that party has a direct and substantial interest which may be affected prejudicially by the judgment and order of the court.

[31] It has now become settled law that the joinder of a party is only required as a matter of necessity, as opposed to a matter of convenience, if a party has a direct and substantial interest in the case. Put in another way, it is necessary to join a party to the proceedings if his or her interest will be prejudicially affected by the judgment of the court in the proceedings concerned.

[32] In *Absa v Naude NO*³ the Court stated the following:

“[10] The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined. In *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA) it was held that if an order or judgment cannot be sustained without

³ (20264/2014) [2015] ZSCA 97 (1 June 2015).

necessarily prejudicing the interest of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined. That is the position here. If the creditors are not joined their position would be prejudicially affected; a business rescue plan that they had voted for would be set aside; money that they had anticipated they would receive for the following ten years to extinguish debts owing to them, would not be paid; the money that they had received, for a period of thirty months, would have to be repaid; and according to the adopted business rescue plan the benefit that concurrent creditors would have received namely a proposed dividend of 100 per cent of the debts owing to them, might be slashed to a 5,5 per cent dividend if the company is liquidated.”

[33] Section 24N of NEMA provides as follows:

“(1)

(8) Notwithstanding the Companies Act, 2008 (Act No. 71 of 2008), or the Close Corporations Act, 1984 (Act No. 69 of 1984), the directors of a company or members of a close corporation are jointly and severally liable for any negative impact on the environment, whether advertently or inadvertently caused by the company or close corporation which they represent, including damage, degradation or pollution.”

[34] It is now settled that, in interpreting statutory provisions, the Court must first have regard to the plain, ordinary, grammatical meaning of the words used in the statute. While maintaining that words should generally be given their grammatical meaning, it has long been established that a contextual and purposive approach must be applied to statutory interpretation. Section 39 (2) of the Constitution of the Republic of South Africa enjoins the Courts, when interpreting any legislation and when developing the common law or customary law, to promote the spirit, purport and objects of the Bill of Rights.

[35] More recently, in *Independent Institution of Education (Pty) Limited v KwaZulu Natal Law Society and Others*⁴ the Constitutional Court again had an opportunity of addressing the issue of interpretation of a statute and stated the following:

“[1] It would be a woeful misrepresentation of the true character of our constitutional democracy to resolve any legal issue of consequence without due deference to the pre-eminent or overarching role of our Constitution.

[2] The interpretive exercise is no exception. For, section 39(2) of the Constitution dictates that ‘when interpreting any legislation ... every court, tribunal, or forum must promote the spirit, purpose and objects of the Bill of Rights’. Meaning, every opportunity courts have to interpret legislation, must be seen and utilised as a platform for the promotion of the Bill of Rights by infusing its central purpose into the very essence of the legislation itself.”

[36] The Court continued and stated the following:

“[18] To concretise this approach, the following must never be lost sight of. First, a special meaning ascribed to a word or phrase in a statute ordinarily applies to that statute alone. Second, even in instances where that statute applies, the context might dictate that the special meaning be departed from. Third, where the application of the definition, even where the same statute in which it is located applies, would give rise to an injustice or incongruity or absurdity that is at odds with the purpose of the statute, then the defined meaning would be inappropriate for use and should therefore be ignored. Fourth, a definition of a word in the one statute does not automatically or compulsorily apply to the same word in another statute. Fifth, a word or phrase is to be given its ordinary meaning unless it is defined in the statute where it is located. Sixth, where one of the meanings that could be given to a word or expression in a statute, without straining the language, ‘promotes the spirit, purport and objects of the Bill of Rights’, then that is the meaning to be adopted even if it is at odds with any other meaning in other statutes.”

[38] It is a well-established canon of statutory construction that ‘every part of a statute should be construed so as to be consistent, so far as possible, with every other part of that statute, and with every other unrepealed statute enacted by the Legislature’. Statutes dealing with the same subject matter, or which are *in pari material*, should be construed

⁴ [2019] ZACC 47.

together and harmoniously. This imperative has the effect of harmonising conflicts and differences between statutes. The canon derives its force from the presumption that the Legislature is consistent with itself. In other words, that the Legislature knows and has in mind the existing law when it passes new legislation, and frames new legislation with reference to the existing law. Statutes relating to the same subject matter should be read together because they should be seen as part of a single harmonious legal system.

[41] The canon is consistent with a contextual approach to statutory interpretation. It is now trite that courts must properly contextualise statutory provisions when ascribing meaning to the words used therein. While maintaining that word should generally be given their ordinary grammatical meaning, this Court has long recognised that a contextual and purposive must be applied to statutory interpretation. Courts must have due regard to the context in which the words appear, even where ‘the words to be construed are clear and unambiguous’.

[42] This Court has taken a broad approach to contextualising legislative provisions having regard to both the internal and external context in statutory interpretation. A contextual approach requires that legislative provisions are interpreted in of the text of the legislation as a whole (internal context). This Court has also recognised that context included, amongst others, the mischief which the legislation aims to address, the social and historical background of the legislation, and, most pertinently for the purposes of this, other legislation (external context). That a contextual approach mandates consideration of other legislation is clearly demonstrated in *Shaik*. In *Shaik*, this Court considered context to be ‘all-important’ in the interpretative exercise. The context to which the Court had regard included the ‘well-established’ rules of criminal procedure and evidence and, in particular, the provisions of the Criminal Procedure Act.”

[37] Textually, section 24N (8) of NEMA is clear, plain, and unambiguous. I do not agree with the applicant that since it does not expressly exclude the employees then it means that the employees are included. It is a basic principle of interpreting a statute not to read into it anything more than what is contained therein. Section 24N (8) specifically mentions the directors of a company and or the members of a close corporation. This is so because the directors of a company and the members of a close corporation have the duty and power to oversee and control, direct, and are accountable on behalf the company whilst the employees perform their duties

in terms of the terms and conditions of their employment by the company. If the legislature intended section 24N (8) to include the employees, it would have expressly done so and it did not.

[38] Furthermore, the applicant places reliance on the general conditions for the Water Use Licence Number 04/B20F/CGI/1836 for joining the eleventh to thirteenth respondents in these proceedings which conditions provide the following:

“1 General

1.1 ...

1.4 The conditions of the authorisation must be brought to the attention of all persons (employees, sub-consultants, contractors etc.) associated with the undertaking of these activities and the licensee must take such measures that are necessary to bind such persons to the conditions of this licence.”

[39] The condition of the water use licence is clear and unambiguous in that it provides and creates a duty on the licensee, which is Eskom in this case, to take the necessary measures that its employees, including consultants that are employed by Eskom, to inform such persons and to ascertain that they comply with the conditions of the licence. The condition does not make the employees personally liable for non-compliance with the condition. It is Eskom that is liable for non-compliance should its employees fail to comply with the conditions of the licence and Eskom must make sure that the employees bind themselves to comply with the conditions of license otherwise Eskom will not be able to use the employees or consultants as an excuse for non-compliance.

[40] The employees of Eskom are working at Kusile to execute the mandate given to them by Eskom. They are not working at Kusile to further their personal interests but that of Eskom, on the instructions and directions of Eskom and in terms of the terms and conditions of their employment. The employees of Eskom therefore do not have a substantial and direct interest in this case. The unavoidable conclusion is therefore that it was not necessary for the eleventh to the thirteenth respondents

to be joined in these proceedings. Thus, the application against the eleventh to thirteenth respondents falls to be dismissed.

[41] I do not agree with the respondents that the EMC should have been joined in these proceedings. Applying the same test as laid down by the Supreme Court of Appeal in the *Absa* case⁵, the EMC is a committee which performs the function of collating reports regarding the environment and its duty is to report to the relevant authorities. It is not a legal entity capable of being sued or sue on its own account. It does not have any substantial and direct interest in the matter. The EMC will suffer no prejudice in the judgment in this matter since its mandate is to receive and keep record of reports and to report non-compliance to the relevant departments. The irresistible conclusion is therefore that it is not necessary to join the EMC in these proceedings and the point in limine in this regard therefore falls to be dismissed.

Factual Background

[42] The genesis of this case arose well before 2008 when the planning of the Kusile Power Station (“*Kusile*”) started. On 17 March 2008 Eskom was awarded the necessary environmental authorisation issued under the Environment Conservation Act, 73 of 1989 (“*the ECA*”) which has to date not been amended. The applicant only became aware of the Kusile project later in 2008 when construction on the site adjacent to it commenced. Although the applicant is directly adjacent to the Kusile site, it was never involved and was not given notice nor was there any public participation process before the construction of Kusile commenced.

[43] The clauses of the authorisation stipulate specific conditions that all polluted water must be recycled until all pollutants are captured as waste for disposal with the ash deposition. Further, that a water use license had to be applied for in order to adequately deal with the storage of ash from the ash dump and the disposal of wet

⁵ Ibid footnote 3.

waste from the Flue Gas Desulphurisation Process. Eskom had to establish the Environmental Monitoring Committee whose purpose is to monitor and audit compliance with the conditions of the environmental authorisation, legislation and specific mitigation requirements as stipulated in the environmental impact report and the environmental management plan.

- [44] On the 21st of February 2012 the applicant directed correspondence to Eskom requesting a guarantee on potable water and acceptable air quality in view of the farming work valuable but sensitive genetic material next to Kusile. No guarantees were forthcoming from Eskom. Concerned with the potential air and water quality impacts on the environment and on its swine genetics business, the applicant appointed Dr James Andries Meyer as its stakeholder representative on the EMC at Kusile. The EMC is constituted by amongst others, representatives of the DFFE, DWS and the Environment Control Officer (*“the ECO”*) who is the secretariat of the EMC responsible for receiving and keeping record of monitoring data and reports and reporting any non-compliance to the Minister of Environment
- [45] It is not in dispute that Eskom was required to prepare and provide monitoring data and other reports on regular basis to the EMC. However, this was not done or was done late and the delivery thereof to the EMC was delayed and the monitoring data became dated or submitted to the EMC with glaring deficiencies. When the issues of non-compliance came to the fore in the EMC, the plans proposed by Eskom purporting to address the issues over the years were not carried out as promised and the reasons for that being either lack of resources or procurement issues. Most of the undertakings given by Eskom in response to these issues were reneged upon and investigations would be on going without any meaningful conclusion.
- [46] In 2014 an Environmental Management Programme (*“the EMPr”*) was submitted to the Minister of the Environment on behalf of Eskom. On 8 November 2021 the applicant obtained an electronic version of the EMPr from the ECO for Kusile with the title *‘Environmental Management Programme for the Co-Disposal of Ash and*

Gypsum at the Kusile Power Station'. On 17 July 2015 and in terms of the National Environmental Management: Waste Act 59 of 2008, Eskom was issued with the Integrated Environmental Authorisation for the construction of an ash disposal facility and the disposal of the dry ash generated by the conduction of coal in the electricity generation process to the ash disposal facility.

- [47] The 2015 environmental authorisation, dealing with the locations and monitoring of surface water, stipulated that Eskom shall be responsible for ensuring compliance with the conditions contained therein and that the EMPr which was submitted as part of the application was approved and must be implemented and adhered to. Further, Eskom was required to keep the EMC in place and functioning for the normal operative lifetime of the site operational process and for a period of at least two years after Eskom has ceased operations at Kusile. It further provided for Eskom to obtain a water use license from the DWS prior to the commencement of the project should it impact on any wetland or water resource.
- [48] Eskom was also required in terms of the 2015 authorisation to design and manage storage areas so that there is no escape of contaminants into the environment; that all run-offs must be prevented from entering local watercourses including wetlands. Furthermore, Eskom must not allow effluent or wastewater to be discharged into any stormwater drain or furrow, whether by commission or omission, and must prevent the occurrence of nuisance conditions or health hazards. Eskom must construct and maintain works to divert and drain all run-off water arising on land adjacent to the site to avoid flooding and for the water to become contaminated.
- [49] Section 1 of the EMPr states that its purpose is to describe the manner in which activities associated with the construction and operation of the ash/gypsum co-disposal facility and associated dams and the K-3 and spoil areas, which have the potential to cause pollution or degradation of the environment will be managed and controlled in accordance with the relevant environmental legislation and

standards and practices. Furthermore, the EMPr is for the construction, operation and closure of the ash-gypsum co-disposal facility and associated dams and is applicable through-out its life.

[50] In terms of the EMPr all potentially contaminated water on Kusile will be managed in a closed system. No potentially contaminated water at all will be discharged, released or allowed to escape the Kusile site. The EMPr provides further that the Kusile site is zero-liquid effluent discharge site, the wastewater from a flue gas desulphurisation process will require specialised treatment before it is discharged to the environment. Uncontrolled releases of polluted water from the ash dirty dam into the water resources shall not be permitted and water quality monitoring must be conducted at regular monthly intervals.

[51] Under the Water Use Licence 04/B20F/BCFGIJ/41 issued to Eskom on 1 April 2011 in terms of the NWA, Eskom is required to investigate all uncontrolled leakages and must propose and implement mitigating measures. Further, Eskom shall monitor surface water resources at upstream and downstream points within the drainage line to determine the impact of the facility and other activities on the water quality. The results from the monitoring shall be compiled and submitted to the department on monthly basis. With regard to surface water, the impact of the activities of Kusile shall not exceed the in-stream water quality objectives.

[52] The water use licence of April 2011 provides further that storm water leaving Kusile shall in no way be contaminated by any substance, whether such substance is a solid, liquid, vapour or gas dumped or spilled from the Kusile. The polluted storm water captured in the storm water control dams shall be pumped to the settling facilities for recycling and reuse.

[53] On 20 June 2012 Eskom was issued with Water Use Licence 04/B20F/CGI/1836 in terms of the NWA which deals with the facility to manage dirty water run-off from the ash dump to a lined storage dam. It requires that the wastewater

management facilities be operated in such a manner that it is at all times capable of handling the 1:5 years flood-event on top of its mean operating level to achieve the zero-effluent discharge. It provides further for the quality of water containing waste to be disposed of into the storage dam and the monitoring of surface water to determine the impact of the facility.

[54] On 12 November 2018 Eskom was issued with a Water Use Licence 06/B11K/G/6921 in terms of the NWA which licence was valid for a period of four years. It provides that wastewater is to be used for dust suppression on the haul roads at Kusile. It further provides the maximum volume of wastewater to be used as dust suppression of haul roads and stipulates that the quality of water containing waste which is disposed of into the pollution control dam shall not exceed maximum permissible limits.

[55] It provides further that Eskom shall monitor surface water on a monthly basis to determine the impact of the dust suppression on the quality, by taking samples at two specified monitoring points. Stormwater leaving Kusile shall in no way be contaminated by any substance, whether such substance is a solid, liquid, vapour or gas or a combination thereof which is produced, used dumped or spilled on the Kusile.

[56] On 12 November 2018 Eskom was issued with Water Use Licence 06/B20F/CFI/8171 in terms of the NWA which was valid for a period of four years and contemplates the discharging of waste or water containing waste into a water resource through a pipe, canal, sewer, or other conduit allowing Eskom to discharge wastewater into the water resource downstream from Kusile. It is a condition of this water use licence that it is subject to all the applicable provisions of the NWA and shall in no way be construed as exempting Eskom from compliance with the provisions of any other applicable legislation.

- [57] It further provides that Eskom shall mitigate against potential impacts to surface water quality and shall ensure that the holding recycle dam water containing waste and the station dirty dam water containing waste are not discharged into the water resources. It shall monitor water resources at the tributaries of the Wilge River to South and West of Kusile and which traverse the adjacent properties of the applicant and other agricultural properties. It shall establish a monitoring point between the said wetland and the Wilge River to determine the quality of the water from the wetland and assess the impact thereof on the Wilge River.
- [58] On 23 September 2021, Eskom was issued with a Water Use Licence 06/B20F/CIBG/ 10792 in terms of the NWA defined as the disposing of waste in a manner which may detrimentally impact on a water resource. It cautions that it shall not be construed to be exempting Eskom from compliance with the provisions of any other applicable legislation. Further, it provides that Eskom must ensure that the quality of water to downstream users does not decrease because of Eskom's power generating activities. It authorizes Eskom to dispose of certain maximum quantities of wastewater per annum into the waste management facilities and prescribe the design and capacities of the waste facilities.
- [59] It further provides that Eskom shall monitor on monthly basis the water resources at surface water monitoring points and groundwater monitoring points and on a biannual basis conduct bio monitoring to determine the impact of the facilities and other activities on water quality by taking samples at the monitoring points. Stormwater leaving Kusile shall in no way be contaminated by any substance whether solid or liquid or a combination thereof which is produced or used or dumped or spilled on the premises. The polluted stormwater captured in the storm water control dams shall be reused and recycled.
- [60] In January 2018 the DWS developed and produced an Integrated Water Quality Management Plan (“IWQMP”) for the Olifants River System known as the Upper Olifants Sub-Catchment Plan. The objective of the plan is to manage the water

resources and to take cognisance of and align to a number of studies and initiatives that have been completed at that time. Further, to develop management measures to maintain and improve the water quality in the Olifants Water Management Area in holistic and sustainable manner so as to ensure sustainable provision of water to local and international users.

- [61] The other objective is to clearly define the various impacts to the water resources in the Upper Olifants sub-catchment and propose management options, including an implementation plan to allow the water users, stake holders and regulators to implement solutions in a co-ordinated participative manner. This was due to the deteriorating quality of the whole catchment for which the limits imposed in the water use licences were rather stricter.
- [62] To circumvent the stricter conditions and in an attempt to bring Eskom within the prescribed limits in compliance with the water use licences, on 25 April 2022 Eskom was issued with an amended Water Use Licence 04/B20F/CGI/1836 in terms of the NWA which deals with the monitoring data and other reports for the period of 2020 to date. This was an amendment of the 20 June 2012 water use licence. The amendment relaxed the maximum permissible limits of pollutants or hazardous substances to be released into the dirty dam at Kusile.
- [63] What galvanised the applicant to launch these proceedings is the flagrant disregard of the conditions of the water use licences issued to Eskom in terms of section 40 of the NWA. The applicant contends that, as a result of its failure to comply with the conditions of the water use licences, Eskom has caused pollution of unprecedented proportions in the downstream water resources. The other contributing factor is the lax attitude of the DWS and DFFE to enforce compliance with the conditions of the water use licences and this is undisputed by both the Eskom and the State respondents.

- [64] The applicant contended that it is undisputed that the construction, operation, and maintenance of Kusile by Eskom with regard to the quality of water and management is regulated by statute through various legislative instruments. There are two environmental authorisations and eleven water use licences imposing conditions and legal obligations upon Eskom. It is further undisputed that Eskom has caused the pollution of the downstream water resources as a result of its failure to comply with all the conditions of the water use licences. Any exceedances of the impermissible levels for the water or wastewater quality requirements coming from Kusile unlawfully release substances into a water resource and are of unacceptable pollution of the water resource.
- [65] In terms of NEMA, so the argument went, there must be adequate provision for management and monitoring of the impacts of the activity on the environment throughout the life cycle of the activity. However, there was no monthly monitoring conducted by Eskom for the period August 2021 to November 2021; January and February 2022. The magnitude of exceedances when comparing the average values of upstream for manganese in 2022 is 0.131mg/l whilst the downstream value is 5.73 mg/l. It is alarmingly high than the quality planning limit of 0.02 mg/l as set by the DWS in the 2018 Upper Olifants Sub-Catchment Plan.
- [66] The applicant contended further that the ‘Updated Kusile Power Station Water Management Action Plan’ of 7 July 2023 (“*the updated action plan*”) is not a solution to bring Eskom within the statutory compliance. The plan is clearly fundamentally reactive in nature and does not contain any proactive measures to effectively address the serious water pollution problem. It does not even provide for compliance by Eskom with the legal requirements stipulated in the various water use licences for the construction, maintenance, and operational practices to ensure effective, consistent, and safe performance of the wastewater system and was basically contrived in reaction to the present application.

- [67] The updated action plan, so it was contended, does not even state whether there are resources available for implementing the plan for all the plans that have been proposed at the EMC meetings have fallen flat because there was no financial backing. The plan does not even provide for the substantive resolution of the present environmental problem, the continuous failures of Eskom to comply with the terms and conditions or the legal requirements of the water use licences.
- [68] The State respondents, although represented at the EMC, have done nothing to enforce compliance with the water licences or to hold Eskom accountable for the exceedances. Instead, so the argument went, the State respondents are biased and in favour of Eskom. In April 2022 an amendment was effected to a water use licence without inviting public participation nor participation of the people living adjacent to Kusile. The amendment was to permit an increase in the limits of the pollutants which Eskom could release to the environment.
- [69] The State respondents only sprang into action and came with action plan together with Eskom after the launch of these proceedings, otherwise they were sitting on their hands and doing nothing all the time. The EMC and the ECO, so it was contended, have submitted reports to the DWS as required by the water use licences which showed the exceedances of pollutants discharged by Kusile into the environment and downstream water resources and have done nothing about it. For them to now come with an updated action plan is a smoke screen as though they are doing something. The Masana report submitted by Eskom should not be entertained since it is not supported by an affidavit from the author thereof.
- [70] It is contended further that the updated action plan submitted by Eskom must be treated with caution since it does not deal with compliance but relates to pollution of the environment and downstream water resources as a result of the discharges from Kusile. There are gaps in the monitoring of data with regard to the discharge of pollutants into the downstream water resources and the EMC is dysfunctional since it cannot hold Eskom to account. Further, so it was argued, the

representatives of the State respondents who sit on the EMC do not always attend meetings and even when they are in attendance, they do not insist on compliance with the legal requirements as stipulated in the various water use licences.

[71] The applicant contended that this case can and should be decided on the papers since there is no dispute of fact as alleged by the respondents. The respondents do not dispute that Eskom has failed to comply with the water use licences and that as a result it has caused serious pollution to the downstream water resources. The respondents do not dispute that the State organs have failed to hold Eskom to account for they failed to enforce compliance with the water use licences. Therefore, so it was argued, the Eskom or the State respondents have not raised any bona fide dispute of fact in their affidavits.

[72] Eskom, like the organs of the State, has a positive responsibility to respect, protect, promote, and fulfil the Bill of Rights as provided by the Constitution of the Republic. Although Eskom must ensure that as much as possible electricity is provided to the country, so it is contended, it must strike a balance and ensure that its power stations, Kusile in particular, does not cause unacceptable levels of pollution or environmental degradation. The structural interdict is appropriate in the circumstances to prevent the continuous non-compliance by Eskom with the conditions of the water use licences with the State respondents sitting on their hands and doing nothing to enforce compliance.

[73] The Eskom respondents admit that its operations at Kusile have impacted the downstream water resources, that it has not fully complied with all the conditions in the Kusile's environmental management programme, environmental authorisations, and water use licences at all times. However, Eskom denies that the applicant is entitled to the relief that it seeks which is inappropriate and unnecessary. This is so, as the argument went, because Eskom has developed an updated water management action plan for Kusile which will address not only the pollution but also constitute compliance or at least substantial compliance.

- [74] Presently, says Eskom, it is engaging with the State respondents regarding the challenges it has experienced in complying with the conditions of the environmental authorisations and water use licences issued for Kusile. Both the DWS and the DFFE have recently issued notices of their intention to issue directives to Eskom regarding the non-compliance with the conditions of the water use licences. However, since Eskom has provided a comprehensive response as set out in the updated action plan, the DFFE decided to withdraw the directive and the DWS also elected not to issue a final directive.
- [75] Although Eskom has over the years experienced environmental management challenges in the construction, operation and maintenance of Kusile which has caused it not to comply with all the conditions of the authorisations and licences all the time, it is not necessary for the court to grant the relief as sought by applicant in the form of a structural interdict in light of the updated action plan and the constructive engagement of Eskom with the DWS and the DFFE. Further, so the argument went, this would restrain the State respondents from exercising their statutory powers and would infringe on the doctrine of separation of powers.
- [76] The challenges experienced by Eskom in ensuring compliance with the conditions of its water use licences is not as a result of its deliberate disregard of the law or its lack of commitment to comply or its indifferent approach to the environmental protection. Eskom is continuously striving to address its non-compliance with the environmental authorisations to improve the environmental impact on the downstream water resources in Kusile – hence the updated action plan which addresses the ground and surface water monitoring results and sets out the main sources of pollution at Kusile and the remedial measures prescribed to address these which it is contemplated to be completed by 31 October 2025.
- [77] Furthermore, there is no need for the structural interdict as sought by the applicant since a satisfactory remedy is available to it in terms of section 28 of the NEMA

which empowers the Director-General (“DG”) of the DFFE to issue a directive to a person or company who is responsible for pollution to undertake remedial measures to address such pollution. In the case where the DG has not directed any person to undertake any anti-pollution remedial measures, any private party may, after giving the DG of the DFFE 30 days’ notice apply to court for an order directing or compelling the DG of DFFE to undertake such remedial measures.

- [78] The applicant should, so it was contended, have applied to the court for an order directing the DG of the DFFE to undertake the anti-pollution remedial measures instead of the relief it seeks in terms of the notice of motion. The applicant sought the relief against Eskom and the State respondents on the basis that they are under a constitutional, statutory, and legal duty to ensure that the water resources downstream from Kusile are not polluted at all and that no discharge of polluting substances should occur. This is, as contended by the respondents, incorrect since NEMA, the NWA and other environmental management legislation, by way of their licensing regimes, effectively authorise an acceptable level of pollution.
- [79] It is submitted further by Eskom that there are general specified constraints in the legislation and the relevant water use licences since Kusile is not a zero-liquid effluent discharge site – thus it is allowed to maintain certain levels of discharged pollutants in the downstream water resources. It has proved to be impossible for Kusile to be a zero liquid effluence discharge site – hence Eskom applied and was granted an amendment to one of its waters use licences in 2018 to deviate from a zero liquid effluent discharge site. Further, there was no challenge mounted against the NEMA and the NWA nor has the amendment of the water use licence of 2018 been reviewed.
- [80] The State respondents admit that there has been some lax attitude on their part in enforcing Eskom to comply with the conditions of the water use licences and the legal requirements as stipulated in both the NEMA and the NWA. However, the State respondents contend that they have now, reactively so, done site inspections

at Kusile and have issued directives and notices to Eskom to comply with the conditions of the water use licences. They now seek, reactively to enforce their environmental instruments and empowering legislation.

[81] The State respondents say that the relief sought and the manner in which it was pleaded and formulated by the applicant may lead to judicial overreach if granted for it disregards the role and functions of the State respondents as defined in the empowering legislation being the NEMA and the NWA. The relief sought by the applicant is not competent and practically achievable. It can only be achieved, so it was contended, if a cease-and-desist notice or order interdicting Kusile from operating is issued and such an order would result in disastrous consequences for the general public.

[82] The applicant brought this application prematurely since, until Eskom has finalised its plans for the redesign of its power generating plant and identified possible listed activities and water uses requiring authorisations and licenses and sort out its financial situation, Kusile will continue to pollute the downstream water resources and the degradation of the environment. If Eskom substantially changes the design of Kusile, the environmental authorisations and water use licences already issued up to this point may be rendered academic and Eskom would be required to make applications for the necessary environment authorisations and licences with the State respondents.

[83] It is contended further that the State respondents have since issued a notice of intention to issue a directive to Eskom to comply with the conditions of the water use licences in February 2023, and a site inspection was conducted in November 2023 and a full inspection report was prepared. Again, in December 2023 a directive was issued against Eskom for failure to comply with the conditions imposed in the water use licenses and this caused Eskom to submit an action plan to the DWS. The action plan was considered by the DWS review committee, and a further directive was issued warning that should Eskom fail to comply or comply

inadequately with the directive, the DWS may take measures it considers necessary to remedy the situation including approaching a competent court for appropriate relief.

- [84] Furthermore, so the argument went, Eskom submitted an action plan report to DWS in January 2024 in terms of which Eskom committed to short term as well as long term goals to ensure compliance with the water use licences as well as the NWA. This action plan was determined by the DWS review committee in March 2024 and was deemed to be acceptable. The State respondents have shown that they are not derelict in their constitutional obligation and that the monitoring of pollution at Kusile is continuous.
- [85] It was contended by the State respondents that the applicant has failed to establish that there exist upon the State respondents any duty, whether constitutional, legal, or statutory to ensure that water resources downstream from Kusile are not polluted by the construction, operations and maintenance of Kusile. Further, the applicant has failed to establish the breach of the fundamental rights enshrined in the constitution such as equality, human dignity, life and freedom of security, trade, occupation and profession, environment, and property.
- [86] It is further submitted by the State respondents that the principle of subsidiarity is infringe by the applicant in the manner in which it seeks the relief in this case. There are reasonable legislative measures provided for in the constitution to give effect to the constitutional imperative and are contained in the empowering legislation of the NEMA and the NWA. The applicant has failed to challenge the constitutionality of the empowering legislation and that is fatal to its case. It was unnecessary for the applicant to resort to the fundamental rights contained in the constitution for this may lead to judicial overreach.

[87] As indicated previously, the nineteenth respondent did not make any submissions at the hearing of this matter although counsel was present in court. She only stated that the nineteenth respondent will abide by the decision of the court.

Legal Framework

[88] It is apposite at this stage to restate the sections in the Constitution and both the NWA and the NEMA which are relevant for the discussion that will follow. The Constitution of the Republic of South Africa, 108 of 1996 (*“The Constitution”*) provides as follows:

“Environment

24. everyone has the right –
- (a) to an environment that is not harmful to their health or well-being; and
 - (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Enforcement of rights.

38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-
- (a) anyone acting in their own interest;
 - (b) anyone acting on behalf of another person who cannot act in their own name;
 - (c) anyone acting as a member of, or in the interest of, a group or class of persons;
 - (d) anyone acting in the public interest; and
 - (e) an association acting in the interest of its members”

[89] The National Water Act provides the following:

“Section 1 Definitions

‘Pollution’ means the direct or indirect alteration of the physical, chemical or biological properties of a water resource so as to make it –

- (a) Less fit for any beneficial purpose for which it may reasonably be expected to be used; or
- (b) Harmful or potentially harmful –
 - (aa) to the welfare, health or safety of human beings;
 - (bb) to any aquatic or non-aquatic organisms;
 - (cc) to the resource quality; or
 - (dd) to property.

Giving effect to national water resource strategy

Section 7

The Minister, the Director - General, an organ of state and a water management institution must give effect to the national water resource strategy when exercising any power or performing any duty in terms of this Act.

Prevention and remedying effects of pollution

Section 19

- (1) An owner of land, a person in control of land or a person who occupies or uses the land on which—
- (a) any activity or process is or was performed or undertaken; or
 - (b) any other situation exists,
- which causes, has caused or is likely to cause pollution of a water resource, must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring.”

Rectification of contraventions

Section 53

- (1) A responsible authority may, by notice in writing to a person who contravenes—
- (a) any provision of this Chapter;
 - (b) a requirement set or directive given by the responsible authority under this Chapter; or
 - (c) a condition which applies to any authority to use water,
- direct that person, or the owner of the property in relation to which the contravention occurs, to take any action specified in the notice to rectify the contravention, within the

time (being not less than two working days) specified in the notice or any other longer time allowed by the responsible authority.

- (2) If the action is not taken within the time specified in the notice, or any longer time allowed, the responsible authority may—
- (a) carry out any works and take any other action necessary to rectify the contravention and recover its reasonable costs from the person on whom the notice was served; or
 - (b) apply to a competent court for appropriate relief.”

[90] The National Environmental Management Act provides the following:

“1. Definitions

‘Pollution’ means any change in the environment cause by –

- (i) substances.
- (ii) radio-active or other waves; or
- (iii) noise, odours, dust or heat;

emitted from any activity, including the storage or treatment of waste or substances, construction and the provision of services, whether engaged in by any person or an organ of state, where that change has an adverse effect on human health or well-being or on the composition, resilience and productivity of natural or managed ecosystems, or on materials useful to people, or will have such an effect in the future;

28. Duty of care and remediation of environmental damage

- (1) Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.
- (2) ...
- (4) The Director-General, the Director-General of the department responsible for mineral resources, a provincial head of department or a municipal manager of a municipality may direct any person referred to in subsection (2) to—
 - (a) cease any activity, operation or undertaking;

- (b) investigate, evaluate and assess the impact of specific activities and report thereon;
- (c) commence taking specific measures before a given date;
- (d) diligently continue with those measures; and
- (e) complete those measures before a specified reasonable date.

(4A) Before issuing a directive contemplated in subsection (4), the Director-General, the Director-General of the department responsible for mineral resources, or a provincial head of department or a municipal manager of a municipality must give adequate notice in writing to the person to whom the directive is intended to be issued, of his or her intention to issue the directive and provide such person with a reasonable opportunity to make representations in writing:

Provided that the Director-General, the Director-General of the department responsible for mineral resources, a provincial head of department or a municipal manager of a municipality may, if urgent action is necessary for the protection of the environment, issue the directive referred to in subsection (4), and give the person on whom the directive was issued an opportunity to make representations as soon as is reasonable thereafter.”

(12) Any person may, after giving the Director-General, the Director-General of the department responsible for mineral resources, a provincial head of department or a municipal manager of a municipality, 30 days’ notice, apply to a competent court for an order directing the Director-General, the Director-General of the department responsible for mineral resources, any provincial head of department or a municipal manager of a municipality, to take any of the steps listed in subsection (4) if the Director-General, the Director-General of the department responsible for mineral resources, provincial head of department or a municipal manager of a municipality, fails to inform such person in writing that he or she has directed a person contemplated in subsection (4) to take one of those steps, and the provisions of section 32 (2) and (3) shall apply to such proceedings, with the necessary changes.”

32. Legal standing to enforce environmental laws.

- (1) Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision

concerned with the protection of the environment or the use of natural resources—

- (a) in that person’s or group of persons own interest;
 - (b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
 - (c) in the interest of or on behalf of a group or class of persons whose interests are affected;
 - (d) in the public interest; and
 - (e) in the interest of protecting the environment.”
- (2) A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources, if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought.
- (3) Where a person or group of persons secures the relief sought in respect of any breach or threatened breach of any provision of this Act, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment, a court may on application –
- (a) award costs on an appropriate scale to any person or persons entitled to practice as advocate or attorney in the Republic who provided free legal assistance or representation to such person or group in the preparation for or conduct of the proceedings; and
 - (b) order that the party against whom the relief is granted pay to the person or group concerned any reasonable costs incurred by such person or group in the investigation of the matter and its preparation for the proceedings.”

Discussion

[91] There are two issues central to this case. The first being non-compliance by Eskom with the conditions of the environmental authorizations and water use licences issued to it in terms of section 40 of NWA. The second issue is the failure of the DWS and DFFE to enforce compliance by Eskom with the conditions of the environmental authorizations and water use licences and all other relevant legal requirements. I do not intend to repeat the conditions of the environmental authorisations and water use licences under this heading as they were mentioned in the preceding paragraphs. However, where it is necessary, I will summarise their content and purpose.

[92] It has long been established that motion proceedings are designed for the resolution of legal issues based on common cause facts. Put differently, motion proceedings are to be decided on the papers and only in case there is a factual dispute between the parties which could be foreseen, then it is appropriate that action proceeding should be instituted unless the factual dispute is not real or genuine or bona fide.

[93] The principle was laid down in *Plascon-Evans Paints (TVL) v Van Riebeck Paints (Pty) Ltd*⁶ where the Court, quoting from *Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA (C)* stated the following:

“...where there is a dispute as to the facts a final interdict should only be “granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant’s affidavits justify such an order ... where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted.”

This rule has been referred to several times by this court (see *Burnkloof Caterers Ltd v Horseshoe Caterers Ltd 1976 (2) SA 930 (A)*, at 938; *Tamarillo (Pty) Ltd v BN Aiteken (Pty) Ltd 1982 (1) SA 398 (A)* at 430-1; *Associate South African Bakeries (Pty) Ltd v Oryx & Vereinigte Backereien (Pty) Ltd en Andere 1982 (3) SA 893 (A)* at 923. It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on affidavit, a final

⁶ (53/8; 1984 (3) SA 620 (21 May 1984)4) [1984] ZASCA 51; [1984] 2 All SA 366 (a); 1984 (3) SA 623.

order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances, the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard- *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA at 1163 (T); *Da Mata v Otto* NO 1972 (3) SA 585 (A) at 882).

If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6()(g) of the Uniform Rules of Court (cf *Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire* case supra at 1164) and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see *Rikhoto v East Rand Administration Board* 1983 (4) SA 278 (W) at 283. Moreover, there may be exceptions to this general rule, B as, for example, where the allegations or denial of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers (see the remarks of Botha AJA in the *Associated South African Bakeries* case, supra at 949.”

[94] The principle was expanded upon in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*⁷ where the court stated the following:

“[13] Areal, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say ‘generally’ because factual averments seldom stand apart from a broader matrix of circumstances all of which

⁷ (66/2007) [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) (10 March 2008).

needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settled an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.”

[95] I agree with the applicant that there is nothing in the respondents answering affidavits which raises a real, genuine and bona fide dispute of fact. The dispute raised is not material to the determination of the issues in this case, but it is on peripheral matters as to what causes the pollution and degradation of the downstream water resources. The discomfort of the applicant is that the construction, operation and maintenance of the Kusile by Eskom causes pollution and degradation of the environment and that the State respondents are doing nothing about it. It is my respectful view therefore that the dispute of fact that exists in this case is so immaterial that it is no bar for the Court in determining the matter on paper.

[96] There is no merit in the contention that the applicant brought these proceedings prematurely against the respondents since Eskom has formulated and published an updated action plan to address the concerns and discomfort of the applicant and in particular the pollution and degradation of downstream water resources. It is further not an excuse that, if the design of Kusile were to be changed to enable it to comply, new water use licenses will have to be applied for. It is clear from the monitoring data that the exceedances continue to rise, and the action plan has not been effective. It is only after this application was launched that the State respondents were galvanised into action. However, Eskom invited the applicant to engage with it with regard to the updated action plan, but the applicant did not

engage with Eskom instead chose to only criticise the plan for several inadequacies.

[97] The applicant seeks a structural interdict against the respondents. The requirements for an interdict have long been established in several decisions in that, the applicant should prove that; (a) it has a clear right; (b) injury actually committed or reasonable apprehension of harm; and (c) the absence of similar protection or remedy in due course. These requirements were laid down more a century ago in *Setlogelo v Setlogelo*⁸.

[98] Undoubtedly, the applicant has met the first two requirements for an interdict in that the applicant has a clear right to an environment that is not polluted and harmful to its wellbeing. Presently, the environment downstream at Kusile has been and continues to be polluted, harmed and degraded by Eskom with the state respondents sitting on their hands and failing to enforce compliance with the conditions of licenses and legislation. However, the applicant falls short on the third requirement where it is required to prove that it does not have an alternative remedy or would not receive sufficient redress in due course.

[99] I say so because section 28(12) of NEMA provides that any person may, after giving the DG of the department responsible for mineral resources 30 days' notice, apply to a competent court for an order directing the DG of the department responsible for mineral resources to take any steps to direct the person who is causing pollution or degradation of the environment to cease such activity or operation or undertaking or commence specific measures to remedy the situation. The applicant has not avail itself of the remedies provided for in section 28(12) of NEMA. The inescapable conclusion is therefore that the application falls to be dismissed on this basis alone.

⁸ 1914 AD 22.

[100] I am mindful that section 28(12) has been amended which amendment took effect on the 30 June 2023, some ten months after the launch of these proceedings. Ordinarily, when the legislation is promulgated, it does not have a retrospective effect unless it is expressly stated therein that it will be retrospective. However, the only disjuncture between the old section 28(12) and the present amendment relates to an elaborate procedure to be followed by any person who is aggrieved by the failure of the DG or DG of the department responsible for mineral resources to inform him or her in writing of the steps he has taken against someone who pollute or harm or degrade the environment that he may apply to a competent court for an order directing the DG or DG of the relevant department to issue directives to such person.

[101] In *S v Mhlungu and Others*⁹ which was quoted with approval in *Kaknis v Absa Bank Limited; Kaknis v Man Financial Services SA (Pty) Ltd*¹⁰ the Constitutional Court stated the following:

“[65] First, there is a strong presumption that new legislation is not intended to be retroactive. By retroactive legislation is meant legislation which invalidates what was previously valid, or vice versa, i.e. which affects transactions completed before the new statute came into operation. See *Van Lear v Van Lear* 1979 (3) SA 1162 (W). It is legislation which enacts that ‘as at a past date the law shall be taken to have been that which it was not’. See *Shewan Tomes 7 Co. Ltd v Commissioner of Customs and Excise* 1955 (4) SA 305 (A), 311 H per Schreiner ACJ. There is also a presumption against reading legislation as being retrospective in the sense that, while it takes effect only from its date of commencement, it impairs existing rights and obligations, e.g. by invalidating current contracts or impairing existing property rights. See *Cape Town Municipality v F. Robb & Co. Ltd.* 1966 (4) SA 345 (C), per Corbett J. The general rule therefore is that a statute is as far as possible to be construed as operating only on facts which come into existence after its passing.”

[102] The court continued in paragraph 66 and stated the following:

⁹ (CCT25/94) [1995] ZACC 4; 1995 (3) SA 867; 1995 (7) BCLR 793 (CC) (8 June 1995).

¹⁰ (08/16) [2016] ZASCA 206; [2017] 2 All SA 1 (SCA); 2017 (4) SA 17 (SCA) (15 December 2016).

“[66] There is a different presumption where a new law effects changes in procedure. It is presumed that such a law will apply to every case subsequently tried ‘no matter when such case began or when the cause of action arose’ – *Curtis v Johannesburg Municipality* 1906 TS 308, 312. It is, however, not always easy to decide whether a new statutory provision is purely procedural or whether it also affects substantive rights. Rather than categorising new provisions in this way, it has been suggested, one should simply ask whether or not they would affect vested rights if applied retrospectively.”

[103] Although section 28(12) has been amended, the amendment did not in my view affect the rights of any person in enforcing his rights in terms of the NEMA. The amendment relates only to the procedural aspect that is to be followed in certain instances. It is my respectful view therefore that, although legislation does not, as a matter of course, have retrospective effect when promulgated, in this instance, it is applicable even though this action was instituted before the amendment took effect.

[104] Even if I were to be wrong in saying the applicant has not met all the requirements of an interdict, I am still of the view that the failure of the applicant to invoke the provision of the NEMA and the NWA infringes on the principle of subsidiarity in our law. The preamble to the NEMA is that the law should establish principles guiding the exercise of functions affecting the environment, ensure that state organs maintain the principles guiding the exercise of functions affecting the environment and the procedures and institutions to facilitate and promote co-operative government and intergovernmental relations; and should be enforced by the State and the law should facilitate the enforcement of environmental laws by civil society.

[105] In *My Vote Count v My Vote Counts NPC v Speaker of the National Assembly and Others*¹¹ the Constitutional Court stated the following:

“[50] But the most frequent invocation of subsidiarity has been to describe the principle that limits the way in which litigants may invoke the Constitution to secure enforcement

¹¹ 2015 (12) BCLR 1407 (CC).

of a right. Under the interim Constitution, where the Appellate Division had no constitutional jurisdiction, and this Court had constitutional jurisdiction, this Court laid down as a general principle that, where it was possible to decide a case, civil or criminal, without reaching a constitutional issue that should be done. This entailed the subsidiarity of the interim constitution to the other judicial approaches to rights enforcement.

[52] But it does not follow that resort to constitutional rights and values may be freewheeling or haphazard. The Constitution is primary, but its influence is mostly indirect. It is perceived through its effects on the legislation and the common law - to which one must look first.

[53] These considerations yield the norm that a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right. This is the form of constitutional subsidiarity Parliament invokes here. Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role.

[54] Over the past 10 years, this Court has often affirmed this. It has done so in a range of cases. First, in cases involving social and economic rights, which the Bill of Rights obliges the state to take reasonable legislative and other measures, within its available resources, to progressively realise, the Court has emphasised the need for litigants to premise their claims on, or challenge, legislation Parliament has enacted. In *Mazibuko*, the right to have access to sufficient water guaranteed by section 27(1)(b) was in issue. The applicant sought a declaration that a local authority's water policy was unreasonable. But it did so without challenging a regulation, issued in terms of the Water Services Act, that specified a minimum standard for basic water supply services. This, the Court said, raised 'the difficult question of the principle of constitutional subsidiarity'. O'Regan J, on behalf of the Court, pointed out that the Court had repeatedly held 'that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution'. The litigant could not invoke the constitutional entitlement to access to water without attacking the regulation and, if necessary, the statute."

[106] Quoting from the minority judgment continued and stated the following:

"[160] ...The minority judgment correctly identifies the 'inter-related reasons from which the notion of subsidiarity springs.' First, allowing a litigant to rely directly on a

fundamental right contained in the Constitution, rather than on legislation enacted in terms of the Constitution to give effect to that right, ‘would defeat the purpose of the Constitution in requiring the right to be given effect by means of national legislation’. Second, comity between the arms of government enjoins courts to respect the efforts of other arms of government in fulfilling constitutional rights. Third, ‘allowing reliance directly on constitutional rights, in defiance of their statutory embodiment, would encourage the development of ‘two parallel systems of law.’”

[107] Recently, in *Minister for Transport and Public Works: Western Cape & others v Adonisi and Others*¹², affirming the principle of subsidiarity in our law, the Supreme Court of Appeal stated the following:

“[32] It is necessary, first, to highlight that the principle of constitutional subsidiarity is part of our Constitutional framework. The foundational norms of the Constitution are expressed in general terms. Where legislative and other measures have been enacted to realise the rights and obligations in the Constitution, the foundational norms espoused in the Constitution should find expression in such legislative measures. By way of example, the preamble to SPLUMA recognises that many people in South Africa continue to live and work in places defined and influenced by past spatial planning, land use laws, and practices, which were based on racial inequality, segregation, and unsustainable settlement patterns. It provides that it is the obligation of the State to realise the constitutional imperatives in ss 24, 25, 26, and 27(1) of the Constitution. Section 12(1) of SPLUMA imposes an obligation on the national, provincial, and local governments to prepare spatial development frameworks. The statute, rather than the Constitution, is therefore the direct source of the rights and obligations relating to preparation of spatial development frameworks. It is to its statutory provisions that litigants must look in asserting their rights and the obligations owed to them.”

[108] The principle of subsidiarity was again emphasized by the Supreme Court of Appeal in *City of Cape Town v Commando and Others*¹³ when the Court stated as follows:

“[56] Having failed to identify the source of the constitutional duty in the Constitution or the Housing Act, the occupiers resorted to relying on s 26 of the Constitution in general

¹² (522/2021 & 523/2021) [2024] ZASCA 47 (12 April 2024).

¹³ (1303/2021) [2023] ZASCA 7 (6 February 2023).

terms. However, the principle of subsidiarity prohibits direct reliance on the Constitution where specific and detailed legislation giving effect to a right sought to be enforced has been passed. In any event, as I have demonstrated, none of the legal framework programmes guarantees such a right or imposes the suggested duty on the State.”

[109] Counsel for the applicant referred the court to the case of *Komatipoort Despondent Residents Association v Nkomazi Local Municipality*¹⁴ where the Court granted a structural interdict against the State respondents. However, the issues in this case are distinguishable from the present case. The bone of contention between the parties was shortage of supply of potable water which led to the appalling sewage conditions and sewage spillages with some hazardous consequences to the citizens of Komatipoort and surrounding areas. This affected the Komatipoort Town and the Crocodile River which was aimed to supply drinking water to the community but instead sewage was dumped into the river.

[110] Although the issues are almost similar in that the spillage of sewage lands itself in polluting and degrading the environment and endangers the well-being of the community that is using the polluted water, I do not agree with this decision because it did not consider the provisions of section 28(12) and thus infringed on the principle of subsidiarity. Secondly, the decision did not consider that there is an alternative remedy in due course available to the applicants other than to interdict the State respondents.

[111] To realise the objectives of section 24 of the Constitution, the legislature promulgated the NEMA and the NWA which empowers the State organs and in particular, the State respondents to provide for co-operative, environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote cooperative governance and procedures for co-ordinating environmental functions exercised by organs of State; to provide for certain aspects of the administration and enforcement of other environmental management laws and to provide for matters connected therewith.

¹⁴ (2832/2023) [2024] ZAMPMBHC 28 (19 April 2024).

[112] I am fortified by the decisions referred to above that the principle of subsidiarity in our law would be infringed if the applicant were to succeed in this case. The applicant should have based its remedy on the provisions of section 28(12) of NEMA, which the legislature has promulgated to enforce the rights arising out of the provisions of section 24 of the Constitution. It is to this statutory provision that the applicant should look in asserting its rights and the obligations owed to it. It is my respectful view therefore, that the application falls to be dismissed on this ground.

[113] In *Affordable Medicine Trust and Another v Minister of Health and Another*¹⁵ the Constitutional Court stated the following regarding the power of functionaries:

“[49] The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the executive ‘are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.’ In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power,”

[114] I am unable to disagree with the State respondents that they only derive their powers from NEMA and NWA and that granting the order as prayed for by the applicant will infringe the principle of separation of powers. Moreover, the applicant has not challenged the constitutionality of the legislation promulgated to enforce the environmental rights in terms of section 24 of the Constitution. If the applicant found the provisions of the NEMA and NWA to be inadequate to enforce the rights enshrined in section 24 of the Constitution, then it should have attacked the constitutionality of the provisions of NEMA and NWA before it attempted to invoke the provisions of the Constitution.

¹⁵ (CCT 27/04) [2005] ZACC 3; 2006 (3) SA 247 (CC).

[115] Granting the orders as prayed for by the applicant would be granting powers to the State respondents which they do not have and has not been given to them by the empowering legislation – hence the court would be offending the principle of separation of powers. The State respondents receive their power to govern matters regarding the environment from the NEMA and NWA and it is not competent for the court to prescribe to the State respondents.

[116] Although section 28(12) speaks directly to the eighteenth respondent and the DG of his department, the eighteenth respondent is not participating in these proceedings. It is however, trite that for a litigant to succeed and obtain judgment in its favour, it must demonstrate to the Court that its case must be believed instead of that of the defendant or respondent. In other words, the onus is on the applicant to prove that the eighteenth respondent had a duty to protect the pollution and degradation of the environment at Kusile downstream resource and has failed to do so.

[117] In *GC v JC and Others*¹⁶ the Supreme Court of Appeal stated the following:

“[40] The onus to prove these requirements rests on the plaintiff. Where a defendant is proved to have initiated a prosecution without reasonable grounds, it does not follow that he acted dishonestly, nor does it necessarily imply that she did so *animo iniuriandi*. However, in the absence of any other evidence the natural inference is that the plaintiff has established both. The defendant thus bears an evidential burden to rebut this inference regarding her state of mind, including any mistake that would exclude her liability.”

[118] For the reasons stated in the preceding paragraphs, the applicant has failed to convince the court that it has a case against the eighteenth respondent. The unavoidable conclusion is therefore that the application against the eighteenth respondent falls to be dismissed.

¹⁶ (Case No 205/2019) [2021] ZSCA 012 (3 February 2021).

Costs

[119] Eskom has indicated during the hearing of this case that it is of the view that, if the Court finds in its favour, that it would not persist with an order for costs against the applicant. However, the State respondents seek a costs order in terms of the new scale C due to the complexity of the matter including costs of two counsel. The applicant contended for costs on the same scale C and the costs of two counsel and that of Dr Meyer as an expert in this case. Should the Court find against it, the applicant sought the protection of section 32 of NEMA in that it acted reasonably out of concern in the interest of protecting the environment and have made efforts to use other means available for obtaining the relief it sought.

[120] I am unable to disagree with the applicant and Eskom that an appropriate order for costs in this case would be that each party pays its own costs. Section 32 was promulgated to protect and encourage individuals and litigants in general to litigate against the State where their fundamental rights are being breached. The applicant in the present case has taken all reasonable steps to bring it to the attention of the State organs that the environment at Kusile downstream resources is being polluted and degraded by exceedances flowing from Kusile due to its failure to comply with the conditions of its authorisations and water use licences.

[121] The applicant has not sat on its hands when it became aware of the Kusile project in 2008 as it immediately appointed Dr Meyer to represent it on the EMC of Kusile. It is on record that Dr Meyer has been a thorn in the flesh on the EMC about Eskom's monitoring processes and non-compliance with the authorisations and water use licences and the lax attitude of the State respondents in holding Eskom accountable and enforcing compliance with the conditions of its authorisations and water use licences.

[122] I am of the considered view therefore that the applicant does not deserve to be mulcted with a costs order for its failure to meet all the requirements of the

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Date of Hearing: **23 - 25 April 2024**

Date of Judgment: **19 June 2024**

Delivered: This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 19 June 2024.

